

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

WILLIAM R. HALL,

Petitioner,

vs.

PEOPLE OF THE STATE OF
ILLINOIS

Respondent.

Review of the Appellate
Court of Illinois,
Fourth District

—
No. 78-486

BRIEF IN OPPOSITION TO THE
PETITION FOR WRIT OF CERTIORARI

WILLIAM J. SCOTT

Attorney General of the State of Illinois,
160 North LaSalle Street, Suite 900,
Chicago, Illinois 60601
(312) 793-3500,

DONALD B. MACKAY,

MICHAEL B. WEINSTEIN,
Assistant Attorneys General,
188 W. Randolph St. (Suite 2200)
Chicago, Illinois 60601
(312) 793-2570

Attorneys for Respondents.

M. ANITA DONATH

Assistant Attorney General
188 W. Randolph St. (Suite 2200)
Chicago, Illinois 60601

Of Counsel.

TABLE OF CONTENTS

	<u>Page</u>
OPINION BELOW	1
JURISDICTIONAL STATEMENT.....	2
QUESTIONS PRESENTED FOR REVIEW.....	2
STATEMENT OF FACTS	2
REASONS FOR DENYING THE WRIT OF CERTIORARI.....	3
I. THE ILLINOIS APPELLATE COURT CORRECTLY RECONSIDERED THE INSTANT CASE IN LIGHT OF <i>FRANKS</i> v. <i>DELAWARE</i>	3
II. THE DEFENDANT'S RIGHT TO CHAL- LENCE THE SEARCH WARRANT UN- DER <i>FRANKS</i> IS NOT NULLIFIED BY THE "JOHN DOE" AFFIANT	5
III. THE APPELLATE COURT CORRECTLY DEFERRED THE ISSUE OF THE "JOHN DOE" AFFIANT WHICH IS NOT RIPE FOR DETERMINATION.....	8
IV. PETITIONER HAS FAILED TO AD- VANCE REASONS NECESSITATING THE RE-EVALUATION OF THIS COURT'S REJECTION OF A <i>PER SE</i> RULE PROHIBITING THE USE OF A "JOHN DOE" AFFIANT TO OBTAIN A SEARCH WARRANT	10
CONCLUSION	12

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Aguilar v. United States</i> , 378 U.S. 109, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964)	7
<i>Franks v. Delaware</i> , 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978)	3, 9
<i>McCray v. Illinois</i> , 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967)	9, 10
<i>People v. Jackson</i> , 37 Ill. App.3d 279, 345 N.E.2d 509 (4th Dist. 1976)	8
<i>People v. Mack</i> , 12 Ill.2d 151, 145 N.E.2d 609 (1957)	10
<i>People v. Stansberry</i> , 47 Ill.2d 541, 268 N.E.2d 431 (1971), cert. denied, 404 U.S. 873, 92 S.Ct. 121, 30 L.Ed.2d 116	5, 10
<i>Roviaro v. United States</i> , 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957)	10
<i>United States ex rel. Pugh v. Pate</i> , 401 F.2d 5 (1968) cert. denied, 394 U.S. 999, S.Ct. 1590 (1969)	10

No. 79-320

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

WILLIAM R. HALL,***Petitioner,*****vs.****PEOPLE OF THE STATE OF
ILLINOIS*****Respondent.***

Review of the Appellate
Court of Illinois,
Fourth District

No. 78-486

**BRIEF IN OPPOSITION TO THE
PETITION FOR WRIT OF CERTIORARI**

OPINION BELOW

The opinion of the Appellate Court of Illinois, Fourth Judicial District, affirming petitioner's conviction is submitted to this Court as an exhibit to the Petition for Writ of Certiorari and, therefore, is not contained in this brief in opposition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition. However, as treated more fully in the argument contained herein, respondent does not believe that the petitioner has shown any reason for this Court to exercise its sound judicial discretion to grant his Petition for Writ of Certiorari.

QUESTIONS PRESENTED FOR REVIEW

- I. Whether the Illinois Appellate Court correctly reconsidered the instant case in light of *Franks v. Delaware*.
- II. Whether the defendant's right to challenge the search warrant under *Franks* is nullified by the "John Doe" affiant.
- III. Whether the issue of the constitutionality of the "John Doe" affiant under *Franks* is ripe for determination.
- IV. Whether petitioner has advanced reasons necessitating the re-evaluation of this Court's rejection of a *per se* rule prohibiting the use of "John Doe" warrant complaints.

STATEMENT OF FACTS

Respondent wishes to add the following to petitioner's statement of the facts. On October 27, 1975, John Doe, a fictitious name, appeared before an associate judge in the Circuit Court of Macon County and signed and swore to a complaint for a search warrant. On the basis of that complaint, the search warrant of which petitioner complains was issued.

REASONS FOR DENYING THE WRIT OF CERTIORARI

INTRODUCTION

Respondent submits that the petitioner has failed to show the need for this Court, in the exercise of its sound judicial discretion, to grant this petition. Firstly, petitioner's rights under *Franks v. Delaware* were correctly determined by the Illinois Appellate Court pursuant to this Court's order. Below, petitioner unsuccessfully sought to raise the issue of "John Doe" warrant complaints which he contended were implicitly unconstitutional under *Franks v. Delaware*. Respondent submits that the appellate court correctly deferred this issue as one not presented under *Franks*. Furthermore, respondent submits that even if this Court were to decide such issue was implicitly presented by *Franks*, that certiorari should not be granted for the additional reason that such issue is not ripe for determination under the facts of this case.

I.

THE ILLINOIS APPELLATE COURT CORRECTLY RECONSIDERED THE INSTANT CASE IN LIGHT OF *FRANKS V. DELAWARE*.

This Court remanded the instant case to the Illinois appellate court for reconsideration in light of the decision in *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). *Franks* established the right of the defendant to challenge the veracity of the affidavit in support of the search warrant and to obtain an evidentiary hearing if a substantial preliminary showing is made (1) that such affidavit contains a false statement made knowingly or with reckless disregard for the truth, and (2) that the false statement was necessary for the determination of probable cause. The *Franks* decision directly conflicted with Illinois law which had prohibited such veracity challenges. Furthermore, in the instant case, the appellate court's first opinion had applied this Illinois rule.

Upon reconsideration the appellate court considered whether the defendant had fulfilled the *Franks* requirements for an evidentiary hearing. In his pre-trial motion to suppress defendant had charged that the affidavit was based upon false information, *i.e.*, that David Weller resided at 729 West Wood Street, Decatur, when the police had arrested David Weller on October 20, 1975, and knew that he resided at 47 Oakridge Drive, Decatur, Illinois. The affidavit stated that the affiant had been in the apartment on two occasions in the past 7 days and had seen a substance described to him by David Weller as being cannabis and that the substance appeared to be cannabis to the affiant. The conclusion of the appellate court was that the allegedly false statement was unnecessary to support a finding of probable cause. While noting that the charge of falsity was unsupported by sworn statements of witnesses or an allegation that the affiant was a police officer who knew or should have known Weller did not reside there, the appellate court excused these infirmities because the *Franks* requirements were unknown to defendant at the time the motion to suppress was filed. However, the appellate court did not remand to the trial court because no amendment to the motion to suppress could have made Weller's status as an occupant of the apartment necessary to support the finding of probable cause. Therefore, the appellate court concluded that the defendant's rights under *Franks* had not been violated and again affirmed the judgment of the trial court.

Petitioner argues that the original petition for certiorari did not raise the issue of defendant's denial of a veracity challenge; therefore, the appellate court should have considered the issue of the constitutionality of the fictitious affiant, a question that was presented to the Court.

However, the appellate court correctly noted that the petition had raised the issue of whether the complaint established probable cause. Therefore, a subsidiary question of probable cause was whether defendant had been denied the

opportunity to challenge the warrant's veracity. Thus, Supreme Court Rule 23(1)(c) made this a proper issue before the Supreme Court. Furthermore, the original petition for certiorari's statement of facts informed the Court that petitioner had moved to attack the warrant because it contained false allegations knowingly made. Clearly, the issue of defendant's right to challenge the warrant's veracity was before the Supreme Court and, therefore, properly considered by the appellate court.

Also, petitioner argues that retroactive application of *Franks* was in violation of past Supreme Court decisions denying retroactive application of the exclusionary rule. Such argument is totally devoid of merit because the Supreme Court ordered the retroactive application of *Franks* in its mandate to the appellate court. Moreover, petitioner's argument that the fictitious affiant is unconstitutional under *Franks* is dark indeed without the luminescence of retroactivity.

II.

THE DEFENDANT'S RIGHT TO CHALLENGE THE SEARCH WARRANT UNDER *FRANKS* IS NOT NULLIFIED BY THE "JOHN DOE" AFFIANT.

Petitioner argues that the appellate court was bound under *Franks* to reconsider the viability of the Illinois rule permitting the use of "John Doe" warrant complaints set forth in *People v. Stansberry*, 47 Ill.2d 541, 268 N.E.2d 431, *cert denied*, 404 U.S. 873, 92 S.Ct. 121, 30 L.Ed.2d 116 (1971). However, the *Franks* decision makes no mention of the constitutionality of the fictitious affiant. Therefore, petitioner's argument that *Franks* implicitly overrules *Stansberry* has merit only if the "John Doe" affiant nullifies the defendant's constitutional rights set forth in *Franks*. The fact that the "John Doe" affiant may restrict the defendant's right to challenge the warrant's veracity is insufficient to establish a constitutional violation. The *Franks* opinion makes clear that the right to a veracity challenge is not

absolute. The right to challenge the truthfulness of the warrant is a limited one, for this Court set forth strict requirements. Allegations of negligence or innocent mistake are insufficient. Also, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. Furthermore, the allegations of falsehood must be accompanied by an offer of proof and be essential to a finding of probable cause. Finally, the Court noted at the outset that the affidavit supporting the search warrant is presumed valid. Therefore, *Franks* does not give the defendant an absolute right to challenge the warrant's veracity. The appellate court correctly noted that criminal proceedings would become even more time consuming if the Court allowed the allegations in the affidavit for a search warrant to be easily challenged.

The petitioner's argument that *Franks* implicitly overrules the Illinois rule in *Stansberry* can be summarized in the following syllogism:

Franks gives the defendant the right to challenge the warrant's veracity.

The defendant cannot challenge the warrant's veracity without the identity of the affiant.

Therefore, the defendant has the right to know the identity of the affiant.

Petitioner's conclusion goes awry with such a faulty minor premise. An analysis of the affidavit in the instant case reveals adequate grounds for a veracity challenge without the affiant's identity. The affidavit stated that the affiant was inside the apartment two times in the last seven days and on each occasion David Weller described to him a substance on the premises as marijuana. A preliminary showing of falsehood could have been made by an allegation that David Weller did not identify a substance as marijuana to anyone on the premises in the last seven days supported by Weller's sworn statement. The defendant does not need to know the affiant's identity to charge that the affidavit contains deliberate falsehoods. Therefore, the defendant's right to challenge the warrant's veracity

was not nullified by the "John Doe" affiant. Petitioner concedes that without the affiant's name he lacks grounds to challenge the warrant's veracity. Thus, he argues that *Franks* gives him the right to embark on a fishing expedition to attempt to come up with some basis to impeach the warrant's veracity.

Respondent submits that sufficient information available for impeachment will necessarily be contained in the affidavit so that a preliminary showing of a falsehood can be made without the affiant's identity. This follows from the probable cause requirement that sufficient facts must be alleged to enable an impartial magistrate to determine whether a crime has been or is about to be committed. The limitation on defendant's right to challenge the first-hand knowledge of the affiant is partly justified by the presumption that the affidavit is valid.

Furthermore, petitioner's acceptance of a limited initial veracity challenge under *Aguilar v. United States*, 378 U.S. 109, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), estops him from arguing that such limitation is unconstitutional in the case at bar. Under *Aguilar* petitioner argues that he has no objection to his inability to challenge the veracity of the first-hand knowledge of the informant because the police officer-affiant must make sufficient allegations to enable the magistrate to make an independent determination of the informant's credibility. However, the defendant is unable to challenge the officer's statements establishing the informant's credibility without knowing the informant's identity. Therefore, under *Aguilar*, the only bases for a veracity challenge are the allegations of the underlying circumstances which reveal the source of the informer's information pertaining to the criminal activity. For example, the officer-affiant alleges that an informant stated he was on the premises two times in the past week and David Weller had described to him each time a substance as marijuana which he believed to be marijuana. The defendant's right to impeach the warrant's veracity is just as limited as in the case at bar because no challenge can be made that the informant was actually on the premises.

However, petitioner argues that under *Aguilar* the affiant has the additional burden to establish the informant's credibility to the magistrate. This approach ignores the reality that an independent means exists to establish the credibility of the anonymous affiant as well. That is, the anonymous affiant himself appears before the magistrate who is thus able to assess his credibility. This circumstance provides further protection against the possibility of a fabricated affidavit. In fact, this presence of the anonymous affiant before the neutral judge assures that the probable cause determination is made by the neutral judge and not by the officer investigating the crime. *People v. Jackson*, 37 Ill. App.3d 279, 345 N.E.2d 509 (4th Dist. 1976). Thus, if the independent means to assess the informant's credibility in *Aguilar* soothes the sting of a restricted veracity challenge, then the presence of the anonymous affiant before the magistrate is a balm to provide the same relief. Therefore, *Aguilar* supports the respondent's argument that the "John Doe" affiant does not unconstitutionally restrict the defendant's right to the initial veracity challenge.

III.

THE APPELLATE COURT CORRECTLY DEFERRED THE ISSUE OF THE "JOHN DOE" AFFIANT WHICH IS NOT RIPE FOR DETERMINATION.

Assuming *arguendo* that the issue of the fictitious affiant is implicitly presented by the *Franks* decision, then respondent submits that any unconstitutional restriction would arise only after the initial veracity challenge. Here, petitioner was unable to make a preliminary showing of falsehood although the affidavit contained sufficient allegations for a veracity challenge without the affiant's identity. Therefore, whether the use of the anonymous affiant could interfere with the defendant's right to a veracity challenge at another stage in the proceedings is not ripe for determination. Respondent submits that when the petitioner makes an initial veracity challenge which entitles him

to an evidentiary hearing, only then does the issue arise of whether the use of a fictitious affiant impermissibly interferes with the defendant's right to a veracity challenge. This approach is suggested by the *Franks* decision, for the Court stated:

The requirement of a substantial preliminary showing would suffice to prevent the misuse of a veracity hearing for purposes of discovery or obstruction. And because we are faced today with only the question of the integrity of the affiant's representations as to his own activities we need not decide, and we in no way predetermine, the difficult question whether a reviewing court must ever require the revelation of the identity of an informant *once a substantial preliminary showing of falsity has been made*. 98 S.Ct. at 2684 (emphasis added).

The Court, therefore, suggests that a preliminary showing of falsity must be made before the disclosure of the informant's identity would ever be required. However, the limitation on the initial veracity challenge is no greater in the instant case than in the case where the affidavit is based on an informant's tip. The right to impeach the police officer's statement does not enable the defendant to impeach the informant's first-hand knowledge or involvement. Therefore, this limitation on the defendant's right to a veracity challenge must be constitutional. If the anonymity of the informant is protected absent deliberate falsehoods by the officer-affiant, then the defendant does not have a constitutional right to the informant's identity for the purpose of making the initial veracity challenge. To decide otherwise would result in the absolute loss of the informant's privilege, for defendants would clamor for the informant's identity in the guise of a veracity challenge. A quote from this Court's opinion in *McCray v. Illinois*, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed2d 62 (1967), expresses a similar concern for the informer's privilege:

If a defendant may insist upon disclosure of the informant in order to test the truth of the officer's statement that there is an informant or as to what the informant related or as to

the informant's reliability, we can be sure that every defendant will demand disclosure. He has nothing to lose and the prize may be the suppression of damaging evidence if the State cannot afford to reveal its source, as is so often the case. . . . 87 S.Ct. at 1060.

In Illinois the informant privilege has been held to protect the identity of the "John Doe" affiant. *People v. Mack*, 12 Ill.2d 151, 145 N.E.2d 615 (1957). The *Mack* decision relied heavily on *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed. 2d 639, which stated that the purpose of the informant privilege is the furtherance and protection of the public interest in effective law enforcement. "The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and by preserving their anonymity encourages them to perform that obligation." *Id.*, 353 U.S. at 59. This Court has recognized that the informant is a vital part of society's defensive arsenal. *McCray v. Illinois, supra*. Respondent submits that so important a privilege justifies a limitation on defendant's right to a veracity challenge.

IV.

PETITIONER HAS FAILED TO ADVANCE REASONS NECESSITATING THE REEVALUATION OF THIS COURT'S REJECTION OF A *PER SE* RULE PROHIBITING THE USE OF A "JOHN DOE" AFFIANT TO OBTAIN A SEARCH WARRANT.

The petitioner relies on the conflicting decisions of *People v. Stansberry, supra*, and *United States ex rel. Pugh v. Pate*, 401 F.2d 6 (7th Cir. 1968), as a reason for seeking certiorari. However, these conflicting decisions arose from an interpretation of the fourth amendment requirement that search warrants shall be supported by oath or affirmation. The Illinois Supreme Court in *Stansberry* held that this requirement was

satisfied by the fictitious affiant while the Seventh Circuit held to the contrary. Whether the "John Doe" affiant fulfills the requirement that the search warrant be supported by oath is not necessary to consider in the case at bar. The *Franks* decision was based upon the fourth amendment requirement that no search warrants shall issue but upon probable cause. In *Franks* the main concern of this Court was that the affiant could use deliberate falsehoods to establish probable cause and then "remain confident that the ploy was worthwhile." However, the use of the "John Doe" affiant does not "denude the probable cause requirement of all meaning". Here the probable cause requirement was satisfied by the affiant's statement that he had been on the premises twice in the last week and had seen a substance described to him by David Weller as marijuana and which the affiant believed to be marijuana. As the warrant contained sufficient allegations on which the defendant could make a preliminary showing of falsehood, the affiant's identity was not necessary for the defendant to exercise his right to a veracity challenge. The competing interests of the informant's privilege and the presumption of the warrant's validity justify such a limitation. Furthermore, the affiant's name is not a necessary prerequisite to insure the fourth amendment protection of probable cause for the exclusionary rule can be applied without it. Thus, the issue of whether the probable cause protection mandated by *Franks* was denied defendant in the case at bar is a separate concern from whether the "John Doe" affiant's oath before the magistrate satisfies the fourth amendment's oath requirement.

The denial of certiorari by this Court in *Stansberry* and *Pugh* was noted by the appellate court in declining to reach the issue of the "John Doe" affiant. The appellate court did not believe that this Court intended to overturn the Illinois rule of *Stansberry* in such an indirect manner. This approach was correct because the reconsideration of the instant case in light of *Franks* did not present the issue of the "John Doe" affiant. Therefore, certiorari should be denied because the instant case does not require a reevaluation of this Court's refusal to adopt a *per se* rule prohibiting the use of the "John Doe" affiant.

CONCLUSION

For the foregoing reasons, respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

WILLIAM J. SCOTT

Attorney General of the State of Illinois,
160 North LaSalle Street, Suite 900,
Chicago, Illinois 60601
(312) 793-3500,

DONALD B. MACKAY,

MICHAEL B. WEINSTEIN,

Assistant Attorneys General,
188 W. Randolph St. (Suite 2200)
Chicago, Illinois 60601
(312) 793-2570

Attorneys for Respondents.

M. ANITA DONATH

Assistant Attorney General
188 W. Randolph St. (Suite 2200)
Chicago, Illinois 60601

Of Counsel.